U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

B4

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: AUG 19 2004

IN RE: Petitioner: [redacted]

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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DISCUSSION: The director denied the employment-based preference visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a Florida company that seeks to employ the beneficiary as its president. The petitioner, therefore, endeavors to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C).

The director denied the petition because: (1) the beneficiary was not employed in a managerial or executive capacity for at least one year in the three years immediately preceding her entry into the United States in a nonimmigrant status; and (2) the proffered position in the United States is not in an executive or managerial capacity.

On appeal, counsel submits a brief.

Section 203(b) of the Act, 8 U.S.C. § 1153(b), states, in pertinent part:

(1) Priority Workers. – - Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers. – - An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. 8 C.F.R. § 204.5(j)(1). No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in an executive or managerial capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The petitioner avers that: (1) it is affiliated with Sol Y Sombra Centro de Jardineria, C.A. of Venezula; (2) sells parts for and services lawn and garden equipment; (3) and employs approximately seven persons, including the beneficiary, who is occupying the proffered position as an intracompany transferee (L-1A). The petitioner is offering to employ the beneficiary permanently at an annual salary of $36,000.

The first issue to be discussed in this proceeding is whether the beneficiary's job with the foreign entity was in a managerial or executive capacity. Pursuant to 8 C.F.R § 204.5(j)(3)(i)(B), the beneficiary must have been

employed by a qualifying foreign entity in a managerial or executive capacity for at least one year in the three years immediately preceding her entry into the United States in a nonimmigrant status.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily-
>
> (i) manages the organization, or a department, subdivision, function, or component of the organization;
>
> (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
>
> (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) or, if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
>
> (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

> (i) directs the management of the organization or a major component or function of the organization;
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> (ii) establishes the goals and policies of the organization, component, or function;
>
> (iii) exercises wide latitude in discretionary decision-making; and
>
> (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

When filing the petition, the petitioner stated that the beneficiary was the president of the Venezuelan company prior to her transfer to the United States. The petitioner described the beneficiary's role with the foreign company by stating that she defined the administrative, operating, and personnel policies of the

company according to Venezuelan law. The petitioner stated further that the beneficiary directed the company through subordinate managers.

In an April 9, 2003 request for evidence (RFE), the director asked the petitioner to submit more specific information regarding the beneficiary's foreign employment, including information about whom the beneficiary supervised. In response, the petitioner submitted a letter from the Venezuelan company describing the beneficiary's duties. According to the letter, the beneficiary's responsibility was "general management and direction of the corporation." The beneficiary also "supervised the quality of repairs, controlled parts inventory and directed the sales personnel with regard to sales of parts and equipment go [sic]." The letter stated that the beneficiary supervised five persons – manager of equipment sales; personnel/finance manager, principal mechanic, parts and repair manager; and computer manager.

The director found that the petitioner had described the beneficiary's duties in broad and general terms, and had not shown that the beneficiary was employed in a managerial or executive capacity with the foreign entity. The director also stated that the petitioner failed to establish that the persons supervised by the beneficiary were managers or professionals.

On appeal, counsel states only that the director's conclusion is inconsistent with the prior approvals of L-1A petitions that the petitioner filed on the beneficiary's behalf.

Counsel's statement on appeal is insufficient to overcome the director's decision. The director's decision does not indicate whether he reviewed the prior approvals of the approved nonimmigrant petitions. If the nonimmigrant petitions were approved based on the same facts that are contained in the current record, the approvals were material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that Citizenship and Immigration Services (CIS) or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). As the petitioner fails to present any evidence in rebuttal to the director's conclusions, the AAO will not disturb the prior finding that the beneficiary's foreign employment does not conform to the regulation at 8 C.F.R. § 204.5(j)(3)(i)(B).

The next and final issue to be discussed is whether the proffered position of president is in a managerial or executive capacity.

When filing the I-140 petition, the petitioner stated that the beneficiary would be responsible for "conducting and controlling all operations and strategic management activities in the United States." In an accompanying

organizational chart, the petitioner indicated that the beneficiary would supervise a service manager and a sales manager. The chart also indicated that the service manager supervised a mechanical technician, and the sales manager supervised two assistants and one mechanic.

In an RFE, the director asked the petitioner to submit a definitive statement about the beneficiary's job duties, as well as its corporate tax returns and W-2 forms. In response, the petitioner restated many of the duties that it listed in the initial letter of support when describing the beneficiary's job. Regarding its staffing level, the petitioner stated that it employed the following individuals: sales and warranty manager; service manager; chief mechanic; mechanic; and three assistant technicians.

The director denied the petition, in part, because the proffered position is neither managerial nor executive. The director noted that only three employees were employed full-time, while the remaining employees worked part-time. The director stated that none of the employees could be considered a professional. The director also added, "The list of employees does not indicate that there are personnel who perform financial, marketing and administrative duties. It can be concluded that the beneficiary performs these duties."

On appeal, counsel states that the beneficiary does not perform financial, marketing or administrative duties; she simply sets the objectives for these areas. Counsel also states that the number of the petitioner's employees fluctuates according to the season (high in summer and low in winter), and that now the petitioner employs nine persons who are : sales manager; warranty manager; service manager; administrative manager; chief mechanic; two mechanics; technician; and secretary. Counsel states that although none of the employees is professional, the beneficiary supervises managerial employees.

The evidence in the record fails to establish that the proffered position is in a managerial or executive capacity. As stated previously, the petitioner is required to furnish a statement that clearly describes the duties to be performed by the beneficiary. 8 C.F.R. § 204.5(j)(5). In both its initial letter and its letter in response to the RFE, the petitioner provided a broad description of the beneficiary's actual duties and failed to substantiate its claims with documentary evidence. For example, in its initial letter of support, the petitioner stated that the beneficiary will coordinate marketing and sales. Although the organizational chart indicates that the petitioner has a sales manager, the record does not clarify who performs the marketing and sales functions that the beneficiary will allegedly coordinate. If the sales manager is actually performing product sales, then he is not employed in a managerial capacity. In addition, if the beneficiary will primarily perform marketing or sales tasks, then her employment would not be primarily managerial or executive in nature. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner also mentioned in its letter of support that the beneficiary will direct "the expense controls of the company, including outsourcing services." The petitioner has neither presented evidence to document the existence of these "outsourcing services" nor identified the services of the alleged providers. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Regarding its staffing level, in both the petitioner's response to the director's RFE and counsel's brief, the petitioner's organizational structure has changed. Not only did the job titles of the petitioner's employees change since the initial filing of the petition, but also the number of the employees. When determining the managerial or executive nature of a position, CIS must consider the staffing level that existed when the petition was filed. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, while counsel claims that the petitioner has grown under the beneficiary's tutelage, the company's growth since the filing of the petition is irrelevant in this proceeding.

A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The petitioner has not adequately established that the beneficiary would be primarily engaged in directing the management of the organization. Accordingly, the position offered to the beneficiary is not in an executive or managerial capacity, and the director's decision to deny the petition on this basis shall not be disturbed.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed. The petition is denied.